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No. 03-572

Supreme Court, U.S.
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In The Supreme Court of the United States

MICHAEL A. KOZIS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR REHEARING

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SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED

Petitioner (i.e. Michael A. Kozis) file this Petition for Rehearing based upon the following grounds which were not previously presented in the Petition for a Writ of Certiorari:

> This Court must take this case in order to address the impact of *State of New Hampshire v. Goss*, No. 2002-445, decided September 29, 2003. Although the Petition for a Writ of Certiorari already filed with this Court addressed other issues, the Petitioner feels obliged to bring before this Court that the Supreme Court of New Hampshire has reconsidered the question and, in interpreting the state constitution, reached a contrary result.

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STATEMENT OF THE CASE

On December 3, 1999, the Petitioner appeared before the Honorable Pamela Albert of the Virginia Beach General District Court for a preliminary hearing. The Petitioner was charged with possession with intent to distribute more than one half ounce, but less than five pounds of marijuana, possession of cocaine, possession of a firearm in the commission of a felony. All charges were certified to the grand jury and indictments were subsequently issued.

On April 26, 2000, Petitioner appeared, by counsel, before the Honorable Kenneth N. Whitehurst, Jr. of the Circuit Court of Virginia Beach in a motion to suppress the evidence obtained during an illegal search of his trash receptacle. Petitioner's motions were overruled and a conditional guilty plea was subsequently tendered.

The Honorable A. Bonwill Shockley presided over the sentencing in this matter on February 21, 2001, and sentenced Petitioner to five years for possessing a firearm in the commission of a felony, two years for possessing a firearm while in possession of narcotics, four years for possession with intent to distribute marijuana and three years for possessing cocaine. All seven years of the drug charges were suspended.

Petitioner was released on bond pending appeal to the Supreme Court of Virginia. On September 28, 2001, the Court of Appeals of Virginia affirmed the trial court's ruling and a three judge panel further upheld the trial court in an opinion dated November 16, 2001. On July 16, 2003, the Supreme Court of Virginia denied Petitioner's petition for appeal.

On September 10, 1999, Detective J.A. Dinonno of the Virginia Beach Police Department executed a search

warrant upon the premises of 1724 Pope Street in the city of Virginia Beach. (Tr. 4-26-00, p. 8). The warrant was obtained on the basis of a sworn affidavit from the same day to which Detective Dinnono was the affiant. Before obtaining the warrant to search Petitioner's property, Detective Dinonno first went to the Petitioner's home and searched through his closed trash cans, where he found what appeared to be a marijuana stem and possible residue or plant material. The plant material was never tested at the laboratory or in the field to establish its actual composition before obtaining the search warrant. (Tr. 4-26-00, p. 10).

The trash cans in which the Detective searched were located on the Petitioner's property, a significant distance from the street and one day prior to the scheduled trash collection. (Tr. 4-26-00, p. 12). Dinonno stated that he searched the cans based on an anonymous tip that Petitioner was growing marijuana. Yet, a search of the home and garage revealed no marijuana growing and no other indicia of distribution. (Tr. 4-26-00, p. 18). The police search did reveal U.S. currency, a small amount of cocaine, marijuana, a handgun, and a 12 gauge shotgun.

Petitioner was arrested and charged with possession with intent to distribute more than one half ounce, but less than five pounds of marijuana, possession of cocaine, possession of a firearm while in possession of narcotics, and possession of a firearm in the commission of a felony. Following a conditional plea, the trial court sentenced Petitioner to what it ruled were mandatory minimum sentences for the firearm convictions. (Tr. 2-21-01, p. 20). Petitioner noted his appeal.

DISCUSSION OF THE SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED

The Supreme Court of New Hamshire has considered the Court's opinion in *Greenwood* and adopted a contrary position. The Court should take the opportunity to revisit its ruling based upon the reasoning adopted by the New Hampshire Supreme Court.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I THE TRIAL COURT ERRED IN NOT SUPPRESSING THE EVIDENCE OBTAINED FROM AN UNREASONABLE SEARCH AND SEIZURE OF A TRASH CAN OF A PRIVATE RESIDENCE.

It is respectfully submitted that both the search of the Petitioner's trash can and the affidavit on which the search warrant was obtained exceeded the scope of the Fourth Amendment. In order for a warrantless search and seizure of a trash can to comply with Fourth Amendment, the owner must have no expectation of privacy. *California v. Greenwood*, 496 U.S. 35, 39, 108 S.Ct. 1625 (1988). The Petitioner had the city trash cans butted up against and on his property with the trash contents placed in opaque garbage bags. The Petitioner had a reasonable expectation of privacy in the items that were seized from the refuse search because he did not have the cans placed in a manner or "area suited for public inspection. . . for the express purpose of having strangers take it." *Id.*, at 40, 108 S.Ct. 1625 *citing United States v. Reicherter*, 647 F.2d 397, 399 (1981). The city refuse containers were placed in accordance with the Code of

the City of Virginia Beach, § 31-27 *Frequency of Collection* which maintains that household trash is to be collected by the City one (1) time a week provided that the cans are located on the curb line of a city right-of-way no earlier than 5:00 p.m. on the day before collection day and by 7:00 a.m. on the day of collection, otherwise the refuse containers are to be removed from view after the day of collection pursuant to § 31-28. City Code § 31-28 further states that the city will not make refuse collection on private property. (*emphasis added).* Trash pick up was scheduled for the next day. Petitioner's trash receptacle was not curbside but still on his property.

The Petitioner testified that the black can, the can given by the City of Virginia Beach expressly for trash, was placed against his fence with six inches of the sixteen inch bottom on his property and the rest was on an easement. (Tr. 4-26-00, p. 40). The easement is a Virginia Power easement and not public property. No right of ingress or egress existed to the public. A survey of the property supported the Petitioner's testimony because the survey indicated that a half a foot remained where the fence ended (Tr. 4-26-00, p. 38). Officer Dinonno in his affidavit for search warrant erroneously stated that the container was located on the property of Brandon Middle School. The Petitioner testified that a survey of his property places the Middle School seventeen and a half feet from his fence where the cans were placed. (Tr. 4-26-00, p. 38). Because the cans were within the Petitioner's property and were placed in such a manner as to manifest an expectation of privacy, the trial court erred in not suppressing the evidence found through the illegal refuse search. The area where the trash cans were located was clearly not open for public observation or access. In addition to the fence and location of the trash cans on the Petitioner's property, the trash cans were shrouded by trees, were in

immediate proximity to the Petitioner's house, and were located in an area used solely for family purposes. (Tr. 4-26-00, p. 44). It would constrain logic to suggest a member of the public would feel he had a right to trespass on the Petitioner's property.

II THE TRIAL COURT ERRED IN NOT SUPPRESSING THE EVIDENCE FROM AN EXECUTION OF A SEARCH WHEN THE AFFIDAVIT LACKED ANY INDICIA OF PROBABLE CAUSE.

There was no substantial basis for the magistrate to find probable cause. Code § 19.1-85 [Repl. Vol. 1960] provides in part: "No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person alleging briefly material facts, constituting probable cause for the issuance of such warrant. No such warrant shall be issued on an affidavit omitting such essentials." In the present case the "material facts" which the affiant says constituted probable cause for the issuance of the warrant, is "an anonymous complainant" alluded to "narcotic activity" at the Petitioner's residence and "observed subjects leaving the garage with bags of marijuana in their hands." This statement does not reflect what this information consists of, no time frame is indicated, nor does it reflect whether the information was based on personal knowledge of the informant who was unknown to the affiant. There is no evidence to believe that the information given by the anonymous complainant is reliable. The affidavit is no more than a statement or conclusion without any basis and also the anonymous tip was made ten (10) days prior to the surveillance. The affiant did conduct surveillance but nothing in the affidavit indicates that the anonymous

complainant was corroborated. Officer Dinonno concedes that the information by itself was insufficient to establish the probable cause needed to obtain a search warrant. The Petitioner contends the small amount of marijuana found from the refuse search is insufficient to corroborate the anonymous tip and to establish probable cause for the search warrant. Therefore, the evidence should have been suppressed, because there was no statement of underlying circumstances, no indication of reliability of the anonymous citizen complainant, the facts are insufficient, and the conclusory nature of the material facts fail to support the affidavit in establishing probable cause. *Colaw v. Commonwealth*, 32 Va. App. 806, 810, 531 S.E.2d 31, 33 (2000).

III THE TRIAL COURT ERRED IN THE IMPOSITION OF THE MANDATORY MINIMUM SENTENCE OF VIRGINIA CODE § 18.2-308.2.

Virginia Code § 18.2-308.2 is unconstitutionally vague and was improperly imposed on the Petitioner. The statues first alleges a person is guilty of a Class 6 felony when he is guilty of a felony and in possession of a firearm. The statute then imposes a minimum mandatory sentence of two (2) years when a person is convicted of "any other felony." Where a statute contains no express definition of a term, the general rule of statutory construction is to infer intent of the legislature from the language and the plain meaning of the words. *City of Virginia Beach v. Flippen*, 251 Va. 538, 467 S.E.2d 471 (1996). With three punishments combined in one statute it is impossible to ascertain the legislative intent and the plain meaning behind the statute and is therefore unconstitutionally vague.

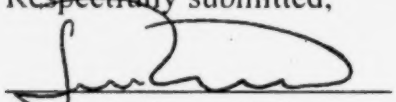
IV THE TRIAL COURT ERRED IN THE IMPOSITION OF THE MANDATORY MINIMUM SENTENCE OF VIRGINIA CODE § 18.2-308.4.

Virginia Code § 18.2-308.4 is unconstitutionally vague and inapplicable because the ordinary meaning of "section" should be applied when reading the statute. Following the ordinary meaning given the context as it is referred in Section B would indicate that the punishment is only applicable for a violation of Section B and not Section A. However, even if the Court determines that the punishment set forth in Section B is applicable to a violation of Section A, the legislative intent cannot be to sentence a person with a lesser offense the same as one who violates Section B which, is a greater offense. Therefore, the sentencing set forth in Section B does not apply to Section A. Therefore, the trial court erred in sentencing the Petitioner with the minimum mandatory five (5) year sentence without parole.

CONCLUSION

For all of the foregoing reasons stated, the Petitioner, Michael A. Kozis, and his counsel James O. Broccoletti, Esq. and John D. Hooker, Jr., Esq. request this Court to grant his Petition for Rehearing on his Petition for a Writ of Certiorari.

Respectfully submitted,



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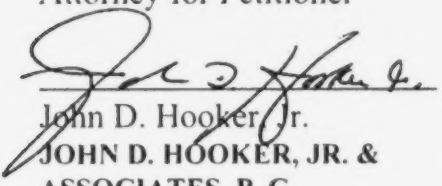

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CERTIFICATE

We, James O. Broccoletti, Esquire and John D. Hooker, Jr., Esquire, Counsel of Record for the Petitioner, Michael A. Kozis, do hereby certify that the Petition for Rehearing is presented in good faith and not for delay and that the grounds for the Petition for Rehearing are limited to substantial grounds not previously presented.

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